

STATE OF MICHIGAN
IN THE SUPREME COURT

KIM SAFFIAN,

Plaintiff/Appellee,

v

Supreme Court Case No. 129263
Court of Appeals Case No. 250645
Lower Case No. 01-006896-NH

ROBERT R. SIMMONS, DDS
Defendant/Appellant.

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DEFENDANT/APPELLANT'S SUPPLEMENTAL BRIEF

ORAL ARGUMENT REQUESTED

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FILED
JUN 28 2006
CORBIN R. DAVIS
CLERK
MICHIGAN SUPREME COURT

129263
Suppl

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STATEMENT OF UNDISPUTED FACTS AND PROCEDURAL HISTORY

This is a dental malpractice case against a general dentist. There is no dispute that Plaintiff/Appellee's cause of action accrued on April 14, 1999. There is no dispute that a Notice of Intent was filed on March 26, 2001 when only eighteen days remained before the statute of limitations expired. There is no dispute that Plaintiff/Appellee's Complaint was filed on August 28, 2001 without an affidavit of merit by a general dentist, but instead with a purported Affidavit of Merit executed by Dr. Mark Nearing, a specialist in endodontics. There is no dispute that the Defendant/Appellant, Dr. Simmons was a general dentist and that Dr. Nearing was not qualified to execute an affidavit of merit in this case pursuant to MCLA 600.2169. It is also undisputed that Plaintiff/Appellee's counsel did not, and could not, have reasonably believed that Dr. Nearing was a properly qualified expert at the time the Complaint was filed, as specifically noted and established by the Trial Court's Order and Opinion of October 24, 2002.

It is also undisputed that the Complaint was served on Defendant/Appellant on September 7, 2001 along with the defective Affidavit of Merit by Dr. Nearing eight days before the statute of limitations expired on September 16, 2001. Since the Complaint was filed without the required affidavit of merit, the dental malpractice action was not commenced by the filing of that Complaint, and the statute of limitations continued to run after August 28, 2001, elapsing eighteen days later on September 16, 2001, **prior to the time the Defendant/Appellant would have been required to answer the Complaint.**

Defendant/Appellant was not required under the court rules to answer a proper Complaint until September 28, 2001 which was twelve days **after** the statute of limitations expired.

It is undisputed that on October 4, 2001, after the statute of limitations expired, Plaintiff/Appellee entered a default against the Defendant/Appellant which was set aside on January 2, 2002 based on a finding that there was a meritorious defense and, based on the Affidavit of Defendant/Appellant's office manager, Mona Wilson, excusable neglect existed.

It must be stressed that at the time Defendant/Appellant filed the motion to set aside the default it was not known to the Defendant/Appellant that Plaintiff/Appellee's expert, Dr. Nearing, was a specialist in endodontics and not a general dentist. That fact did not become known to the Defendant/Appellant until Dr. Nearing's deposition was taken on March 5, 2002. Plaintiff/Appellee's claim that this issue should have somehow been raised when Defendant/Appellant moved to set aside the default is completely without merit. It is simple common sense that the issue could not be raised until the default was set aside, an answer was filed, and the necessary discovery took place. Moreover, Defendant/Appellant did raise the statute of limitations in its Affirmative Defenses.

On March 14, 2002, Defendant/Appellant promptly filed his Motion for Summary Disposition arguing that the Plaintiff/Appellee's Complaint had not commenced the lawsuit, and that as a result the statute of limitations had expired on September 16, 2001.

It must be stressed that there is no dispute that the Defendant/Appellant did act promptly to set aside the default when Defendant/Appellant realized the original Summons and Complaint had not actually been faxed on September 19, 2001. Once the default was set aside Defendant/Appellant did answer the Complaint, did engage in discovery on a timely basis, and upon realizing that Dr. Nearing was not an appropriate expert, and that the Complaint had been filed without a valid affidavit of merit, promptly moved for summary disposition.

The Trial Court reinstated the default rather than grant Defendant/Appellant's Motion for Summary Disposition allegedly for the simple reason that the Defendant/Appellant's phone records showed no fax had occurred on September 19, 2001. However, that fact had never been in dispute. All parties knew from the beginning that no fax had occurred. There is nothing to contradict the testimony of Mona Wilson that she attempted to fax the documents on September 19th and thought at the time she had done so successfully. This is in accordance with her original affidavit which supported the original motion to set aside the default.

The Trial Court decided to ignore Ms. Wilson's testimony and Affidavit and focused only on the fact that the phone record showed no fax had occurred. The Trial Court clearly abused its discretion in finding that the Trial Court had been misled without at least holding an evidentiary hearing to assess Mr. Wilson's credibility for itself. This is particularly true where there was no other evidence which would indicate that the Trial Court had been misled. Simply stated, the Trial Court seized on the same facts it had originally ruled did constitute good cause and excusable neglect when the default was originally set aside, i.e., the fact that the attempt to fax the Summons and Complaint was unsuccessful, to reinstate the default. The Trial Court did so to avoid granting Defendant/Appellant's Motion for Summary Disposition which had been timely filed, and which the Trial Court was obligated to grant as a matter of law under the precedent established by this Court.

Defendant/Appellant would ask the Court to reverse the Court of Appeals and Trial Court, set aside the default, and remand this matter to the Trial Court for entry of a summary disposition in favor of Defendant/Appellant.

ARGUMENT

I. PLAINTIFF/APPELLEE'S DEFECTIVE AFFIDAVIT OF MERIT WAS NOT SUFFICIENT TO COMMENCE A CAUSE OF ACTION, THE STATUTE OF LIMITATIONS

WAS NOT TOLLED, AND EXPIRED PRIOR TO THE TIME THE DEFAULT WAS ORIGINALLY ENTERED AGAINST DEFENDANT/APPELLANT AND SUMMARY DISPOSITION SHOULD HAVE BEEN GRANTED.

This Court has found MCLA 600.2169 to be constitutional. *McDougall v Eliuk*, 461 Mich 15; 597 NW2d 148 (1999). MCLA 600.2169(1) is a clear and unambiguous statute, and in an action against a general practitioner, specifically requires under MCLA 600.2169(1)(C) that the expert testifying against the general practitioner must also be a general practitioner.

In this case it is undisputed that Dr. Nearing was not a general practitioner or general dentist. He was a specialist in endodontics. As such, he was not qualified to execute an affidavit of merit against Dr. Simmons nor to testify against Dr. Simmons under the clear and unambiguous language of the statute. In *Decker v Flood*, 248 Mich App 75; 638 NW2d 163 (2001), the Michigan Court of Appeals found that where the plaintiff's expert specialized in endodontics and the defendant was a general dentist, the defendant general dentist was entitled to summary disposition as a matter of law. The Court of Appeals specifically found that the endodontist's affidavit of merit in *Decker* did not comply with the requirements of MCL 600.2912d(1), and as a result, the statute of limitations had not been tolled and had expired, entitling the defendants to summary disposition as a matter of law. The Court of Appeals in *Decker* specifically found that plaintiff's action had never been commenced.

Plaintiff/Appellee's attempts to argue this case is somehow different from a case where a complaint is filed without an affidavit of merit. However, that is not a valid distinction as the Complaint in this case was filed without an affidavit of merit. In *Holmes v Michigan Capital Medical Center*, 242 Mich App 703; 620 NW2d 319 (2000), documents had been filed with the complaints, from the appropriate experts, but were not affidavits because there was nothing indicting that oath had been taken. The Court of Appeals in *Holmes* found that as the complaints

were filed with improper “affidavits” of merit, the action had not commenced, and the statute of limitations had run as to both claims.

The Court of Appeals in *Apsey v Mem Hosp., (On Reconsideration)*, 266 Mich App 666, 671; 702 NW2d 870 (2005), cited to *Scarsella v Pollak*, 461 Mich 547, 552-553; 607 NW2d 711 (2000,) in finding: “a valid affidavit of merit **must** be filed with the complaint in order to commence a medical malpractice action and to toll the statute of limitations.” (Emphasis added.) The appropriate remedy for failure to file an affidavit of merit meeting the requirement set forth in MCL 600.2912d is dismissal of the complaint without prejudice unless the limitations period has expired, in which case dismissal with prejudice is required. *Kirkaldy v Rim (On Remand)* 266 Mich App 626, 629, 633-637; 702 NW2d 686 (2005); *Mouradian, v Goldberg*, 256 Mich App 566, 571-572; 664 NW2d 805 (2003); *Holmes, supra* at 706-707, 709.

A failure to file an affidavit that complies with the mandatory requirements of MCL 600.2912d regardless of whether the defect in the affidavit rises to the level of gross nonconformance with the statute, requires dismissal of a plaintiff’s complaint with prejudice if, as here, the statute of limitations has run. *Apsey, supra* at 677-678; *Kirkaldy, supra* at 636-637; *Geralds v Munson Healthcare*, 259 Mich App 225, 239-240; 673 NW2d 792 (2003). Accordingly, the trial court erred in failing to dismiss plaintiffs’ action with prejudice.

The Plaintiff/Appellee’s Complaint in this case was filed without an affidavit of merit to support it. The document that was filed did not comply with the clear and unambiguous terms of MCLA 600.2169(1) or MCL 600.2912d. Plaintiff/Appellee needed to file an affidavit of merit signed by a general dentist but failed to do so, and the Trial Court found Plaintiff/Appellee’s counsel had no reasonable basis to believe that Dr. Nearing was an appropriate expert.

Since the Plaintiff/Appellee's Complaint was filed without an affidavit of merit signed by a general dentist, the filing of Plaintiff/Appellee's Complaint did not toll the statute of limitations which ran out on September 16, 2001. Once the statute of limitations expired, so did Plaintiff/Appellee's cause of action. That occurred twelve days before the Defendant/Appellant would have been required to answer the Complaint, if it had been filed with a valid affidavit of merit and an action in fact commenced. Defendant/Appellant had no obligation to answer this Complaint where it was time barred after September 16, 2001, and no action had actually been commenced.

CONCLUSION

Plaintiff/Appellee's purported Complaint was filed August 28, 2001 without an affidavit of merit that comported with the specific and unambiguous requirements of MCL 600.2169(1) and MCL 600.2912d. In order to comply with these statutes Plaintiff/Appellee was required, as a matter of law, to file an affidavit of merit executed by a general dentist. Plaintiff/Appellee's counsel did not have a reasonable belief that the document he filed with the purported Complaint complied with the statutes. Under these facts, Plaintiff/Appellee's action was not commenced on August 28, 2001 and the statute of limitations was not tolled by the filing of these documents.

The statute of limitations ran out on September 16, 2001. The Defendant/Appellant was not defaulted by Plaintiff/Appellee until October 4, 2001. In other words, a default was entered in a case that had never been commenced and was time barred.

At the time the initial default was set aside Defendant/Appellant had no knowledge that the purported Affidavit of Merit was invalid and did not comply with the statutes. Not until the default was set aside could the Defendant/Appellant engage in any discovery. Defendant/Appellant scheduled the deposition of Plaintiff/Appellee's purported expert in a

timely fashion, and only then learned that the alleged affiant was a specialist and not a general dentist. Defendant/Appellant's Motion for Summary Disposition was immediately filed after that deposition and as soon as the information was known to Defendant/Appellant.

Under the circumstances of this case, Defendant/Appellant would ask this Court to find the Plaintiff/Appellee's defective Affidavit of Merit was not sufficient to commence a cause of action, that the statute of limitations had expired, and that the default reentered by the Trial Court must be set aside and this matter remanded for entry of an order of summary disposition in favor of Defendant/Appellant.

Dated: '0-27-2006

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PROOF OF SERVICE

The undersigned certifies that she served on June 27, 2006 a copy of Defendant/Appellant, Robert S. Simmons, D.D.S.'s Supplemental Brief, upon Plaintiff/Appellee's counsel, Aaron Gauthier, the Court of Appeals and the Trial Court by placing same in envelopes addressed to said parties, at their addresses as disclosed by the pleadings of record herein, with postage fully prepaid, and by depositing said envelopes in a U. S. Post Office mail box, in Gaylord, Michigan, on the date noted below.

6-27-2006
Date

Mary Ellen Hart
Mary Ellen Hart